UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SPECTRUM CONTRACTING, INC.

and Case 5–CA–31064

PAINTERS & ALLIED TRADES, DISTRICT
COUNCIL 51, AFL–CIO

Karen Itkin-Roe, Esq., for the General Counsel.
Mr. Lynn Taylor for the Charging Party.
Christopher R. Rau, Esq., of Arlington, VA,
for the Respondent.

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on February 2, 2003, by Painters & Allied Trades, District Council 51, AFL–CIO (the Union), the Regional Director, Region 5, National Labor Relations Board (the Board), issued a complaint on March 31, 2003, alleging that Spectrum Contracting, Inc.[1](the Respondent) had committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Washington, DC, on July 28 through 30, 2003, at which the parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. A brief submitted on behalf of the General Counsel has been given due consideration.[2] Upon the entire record, and from my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

At all times material, the Respondent was a Virginia corporation with an office located in Catharpin, Virginia, engaged the business of performing painting and drywall work. During the 12-month period preceding March 31, 2003, in the conduct of its business operations, the Respondent performed services valued in excess of $50,000 outside the Commonwealth of Virginia. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

[1] At the hearing the parties stipulated that this is the Respondent's correct name.

[2] Counsel for the Respondent did not make a closing legal argument or submit a post-hearing brief. I have attempted to glean its position on various issues from its answer to the complaint and comments and arguments made during the course of the hearing by its counsel.

II. The Labor Organization Involved

The Respondent admits and I find that it the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Alleged Violations of Section 8(a)(1)

The complaint alleges that on January 14, 2003,[3] the Respondent acting through its supervisor Victor Machado violated Section 8(a)(1) of the Act by creating the impression that employees' union activities were under surveillance, by threatening employees, and by interrogating employees. The Respondent denies that Machado is a supervisor or agent within the meaning of Section 2(11) and (13) of the Act.

1. Supervisory Status of Victor Machado

The status of a supervisor is determined by whether or not the individual performs any of the functions enumerated in Section 2(11) of the Act and does so exercising independent judgment. *T.K. Harvin & Sons*, 313 NLRB 510, 530 (1995); *Ohio River Co.*, 303 NLRB 696,717 (1991). There is ample evidence that Machado is a statutory supervisor.

The evidence establishes that Machado has hired or effectively recommended the hiring of employees and has granted them permission to take time off. Miguel Lainez and Isaac Gonzales were employed by the Respondent as painters. Both testified to hearing a job announcement on a Spanish language radio station and calling the telephone number given, Lainez in 2001 and Gonzales in 2002. Their calls were answered by Machado who in both instances directed them to meet him at a paint store. Machado met them at the store and in both instances took them to jobsites immediately thereafter and put them to work.

The Respondent presented testimony purporting to show that Machado did not hire Lainez:

> Q. (By Mr. Rau) Did you make the decision to hire Mr. Lainez?
> A. No.
>
> Q. Who made that decision?
> A. Barry.
>
> Q. When did he make that decision?
> A. Miguel called me over the telephone and then I called Barry and asked him if he needed a painter?
>
> Q. All right. And did Mr. Kramer have an opportunity to review Mr. Lainez's work before hiring?
> A. No, I don't think so.
>
> Q. Did you report to Mr. Kramer about Mr.Lainez's work?

[3] All dates are in 2003 unless otherwise indicated.

A. I imagine I reported it to him because he asked me.

Q. He asked you what?
A. About Lainez's work.

This indicates that Kramer may have made the decision that the Respondent needed another painter, but it was Machado who decided who that painter would be. At the very least, it establishes that Machado effectively recommended that Lainez be hired since Kramer had not observed his work. The situation with Gonzales is similar. Machado claims to have talked to Kramer about Gonzales before he was hired. If true, Kramer apparently accepted Machado's representation that Gonzales was a good worker because this conversation allegedly occurred the first day Gonzales was on the job. Kramer was not present at the jobsite that day and Gonzales did not see him there until about a week later so Kramer's only knowledge concerning Gonzales had to have come from Machado.

In his testimony at the hearing and in an affidavit he had previously given to the Board, Kramer admitted that Machado had made recommendations to him concerning the hiring, firing, and discipline of employees and that he had sometimes followed those recommendations. He specifically recalled that employees named Celestino Diaz and Luis Benavides were hired based on Machado's recommendations.

Isaac Gonzales testified that on 5 or 6 occasions Machado had given him permission to take unscheduled time off. He described one occasion when he called Machado to say he would not be in to work because he was sick. Machado told him that there was "no problem." On another occasion, he asked Machado for permission to take time off the following day because of an appointment with "the Immigration Department." Machado told him that he could go but that he should come to work as soon as possible. Machado admitted that Gonzales had called him about being off because he was sick but said he could not recall if Gonzales had talked to him about an immigration appointment. Gonzales was a believable witness with no interest in this matter who gave detailed testimony about these events. I credit his testimony over Machado's lack of recollection.

Miguel Lainez testified that during the course of his employment with the Respondent he had called Machado about 10 times to request time off and, on 8 or 10 occasions, to report that he was going to be late. Lainez told Machado the reason for needing time off or being late and he responded that it was "okay." Lainez was never directed to call anyone else to request time off or to report that he was running late and he was never disciplined for his attendance or tardiness. On more than one occasion, Lainez called Machado to say that he was waiting at a Metro station for Gonzales who was running late. Machado told him to wait for Gonzales. Machado's testimony confirmed that he received such calls from Lainez. He said that he called Kramer about Lainez's requests for time off only when he "thought it was necessary". He did this about 3 times. When Lainez called to say he was going to be late, Machado did not call Kramer but told Lainez it was "okay." The foregoing establishes that Machado had the authority to grant time off to employees and that he regularly exercised it.

In the affidavit he gave the Board, Kramer identified Machado as his "lead supervisor" and stated that Machado runs the company's "daily operations outside the office." At the hearing, Kramer testified that when an employee had done something wrong he has asked Machado to go to the jobsite and speak to the employee about it. He said Machado delivers materials to the jobsites, inspects the quality of the work being done, is responsible for collecting the employees' time sheets from the jobsites, and, in Kramer's absence, Machado addresses questions concerning the scope of the work at the jobsites. Kramer described Machado as

being his "eyes and ears" when he is not present and said that Machado has reported to him when employees are late for work. He said that he has discussed the possibility to taking disciplinary action against employees with Machado and he is sure that Machado has spoken to employees "about being late or their dress or not performing like they need to, but I don't always know when he does that." Similarly, Machado testified that he visits jobsites, inspects the work that has been done and if anything is wrong with it he tells the foreman and the crew about it.[4] I find that all this establishes that Machado has the authority to responsibly direct the work of the Respondent's employees using independent judgment.

Possession of any one or more of the functions listed in Section 2(11) is sufficient to establish an individual's supervisory status. *Gurabo Lace Mills, Inc.*, 249 NLRB 658 (1980). Based on the evidence that Machado has hired and/or effectively recommended the hiring of employees, has granted employees unscheduled time off, and has responsibly directed the work of the Respondent's employees, I find that he is a supervisor within the meaning of Section 2(11) of the Act. *Queen Mary*, 317 NLRB 1303 (1995); *Delta Carbonate*, 307 NLRB 118, 120 (1992); *Washington Beef Producers*, 264 NLRB 1163, 1174 (1982). Machado regularly served as a translator when Kramer, who does not speak Spanish, spoke to Spanish-speaking employees. He also gave them assignments, delivered paychecks, and spoke to employees about the quality of their work. Kramer testified that Machado "knew what my beliefs were and what my desires were because I asked him to speak for me, to speak on my behalf." I find that Machado was someone whom employees would reasonably believe was speaking and acting for management and was an agent of the Respondent within the meaning of Section 2(13) of the Act. *Southern Bag Corp.*, 315 NLRB 725 (1994).

2. Alleged Interrogations, Coercive Statements, and Impression of Surveillance

On January 14, Machado came to a jobsite where Isaac Gonzales and Miguel Lainez were working. Gonzales testified that Machado approached him and asked him if Lainez was the one going around talking to other employees about the Union. Gonzales responded that he did not know what Machado was talking about. Machado asked if Gonzales was also involved and Gonzales again stated that he did not know what Machado was talking about. Machado then said that project manager Victor Flores had told him that Gonzales had talked to Flores about the Union. Gonzales responded that he had talked to Flores about the Union but that he was just making conversation and not trying to convince him. Machado again asked if Lainez was talking to his fellow workers about the Union. At that point, Lainez arrived and Machado asked him if he was the one inciting the other workers to talk about the Union. Lainez responded that he had attended Union meetings and talked to his fellow workers. Lainez said he was not doing anything illegal but wanted better benefits for the workers. Machado responded that this was "not the right way to do it" and asked Lainez what benefits he was talking about.

Lainez testified that he saw Machado arrive at the jobsite and begin talking to Gonzales. Later, Machado turned to Lainez and said that Lainez was the one who was organizing a union.

[4] At the hearing, Machado steadfastly maintained that he performed no supervisory functions. I do not credit that testimony which was contradicted in numerous instances not only by the credible testimony of employees Gonzales and Lainez but also by the testimony of company president Kramer and an pre-hearing affidavit Machado gave the Board. I find there is no credible evidence casting any doubt on Machado's sworn affidavit which he admittedly signed and initialed. I found his testimony at the hearing, denying that the affidavit truly reflected what he told the Board agent who took it, was not credible.

Lainez asked what he meant. Machado told him "don't play around" and said that he knew that employees were "making a union." Lainez said that was true. Machado told him not to bother with the Union and not to be "stupid." Machado asked him "how many more are on that wave length" and who they were, but Lainez would not tell him. Lainez told Machado that they were not doing anything illegal but were enforcing their rights.

There is no credible evidence in the record which disputes the testimony of Gonzales and Lainez as to what transpired on January 14. When called as a witness by the Respondent, Machado was not asked to describe the conversations he admittedly had with Gonzales and Lainez. He was simply asked a series of leading questions by the Respondent's counsel in which he denied just about every statement that Gonzales and Lainez attributed to him. I found this testimony was not credible.[5] He had previously been called as a witness by the General Counsel and admitted speaking to Gonzales and Lainez at the jobsite on January 14. During that testimony, he was shown a pre-hearing affidavit he had given in which said in that when he arrived at the jobsite that day he heard employees say that Lainez had talked to them about going to union meetings and that he had gone to Gonzales and asked him if he knew what the employees were saying about union meetings. The affidavit also states that he spoke to Lainez about what the employees had said about going to union meetings and that they should join the Union and get more money. Machado claimed that he was misquoted in the affidavit he admittedly signed after having the opportunity to review it. He admitted speaking to Lainez about "meetings" and questioning him about who was attending these meetings but claimed that he did not refer to a union in the conversation. It is simply not believable that he would initiate and carry on a conversation about Lainez' discussions with other employees, which clearly involved the Union, without ever referring to it. It is even less believable that he would be concerned enough to question Lainez and Gonzales about Lainez' talking to the employees about attending "meetings" if he did not know or suspect what those meetings involved. Particularly, since Kramer has admitted that when Machado reported to him that employees were attending "meetings," he and Machado speculated that the meetings involved a union. I found Machado to be a generally untrustworthy witness and his testimony about this incident is one of the reasons.

Analysis and Conclusions

Interrogation of an employee is not unlawful per se. The Board considers all of the surrounding circumstances in determining whether an interrogation is coercive and a violation of the Act. E.g., *Rossmore House*, 1176, 1177 (1984); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In determining what constitutes coercion, the Board uses an objective standard. The test is not whether the coercion succeeded, but whether the employer engaged in conduct which may reasonably tend to interfere with the free exercise of employee rights under the Act. E.g., *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997); *Williamhouse of California, Inc.*, 317 NLRB 699, 713 (1995).

I find that the credible and mutually corroborative testimony of Gonzales and Lainez establishes that, on January 14, Machado came to their jobsite, sought them out, and coercively interrogated them both concerning their union activity and that of other employees.[6] It was

[5] These questions did not direct Machado's attention to the conversations on January 14 or otherwise provide any context. The questions also did not accurately quote the testimony of Gonzales and Lainez; consequently, the answers did not directly contradict that testimony.

[6] I find the minor differences in their testimony, such as the time of day the incident occurred and whether it was in a closet or bathroom do not cast any doubt on their veracity.

Machado who, for no legitimate purpose, first raised the subject of union activity to these two employees, neither of whom, up to that point at least, had openly demonstrated support for the Union. This is coercive. *Hoffman Fuel Co.*, 309 NLRB 327 (1992). Machado questioned both Gonzales and Lainez about their own protected activity and asked the names of other employees who were involved with the Union. This attempt to elicit information concerning their own and other employees' union sentiments or sympathies, information employees are privileged to keep from their employer, was coercive. *Custom Window Extrusions*, 314 NLRB 850, 855-856 (1994). Machado's saying that a union was not "the right way" to go about obtaining benefits and telling Lainez that he was "stupid" for trying to organize a union was also coercive and threatening. At the same time, Machado also created the impression that the employees' union activity was under surveillance by the Respondent by telling them that he knew that Lainez was the one who was organizing the union. This violated Section 8(a)(1) of the Act. *Peter Vitalie Co.*, 310 NLRB 865, 874 (1993).

3. Alleged Questioning of Employees During Trial Preparation

During the first day of the hearing, after reviewing subpoenaed materials provided that day by the Respondent, counsel for the General Counsel elicited testimony from company president Kramer that he had spoken with at least two employees, Eric Marquez and Miguel Flores, concerning Miguel Lainez.[7] Kramer testified that he asked them "what issues they had [with Lainez] and would they write them down." Both employees subsequently gave him written statements. On the second day of the hearing, counsel for the General Counsel moved to amend the complaint to allege: "In March 2003, the exact date of which is not currently known to General Counsel, Respondent, by Barry Kramer, at a jobsite, over time, interrogated employees in violation of Section 8(a)(1) of the Act. She stated that these allegations involved what are known as "*Johnnie's Poultry*" violations. I granted the motion over the Respondent's objection but informed its counsel that I would give him whatever time he needed to answer and to prepare to defend these allegations.

At the conclusion of the Respondent's presentation of evidence, it rested. It did not request that the record remain open or indicate that it wished to present additional evidence concerning these allegations. The time for filing briefs was set for September 3, 2003, and the hearing was closed. On September 3, the Respondent filed an amended answer in which it asserted in response to the oral amendment to the complaint: ". . . said Amendments should be filed in writing and particularized as to who, what, when, where, and why said alleged acts took place (for which a Motion for Bill of Particulars is hereby made), all acts alleged to have taken place are hereby denied." Counsel for the General Counsel has filed a motion to strike the amended answer and the Respondent has filed an opposition to the motion to strike.

I find no reason to strike the Respondent's amended answer which denies the allegations in the amendment.[8] However, the motion for a bill of particulars concerning these allegations is denied. Despite being told it could have additional time, if needed, to respond to the amended complaint and prepare its defense, it made no such request and rested it case. In any event, the motion has no merit. Section 102.15(b) of the Board's Rules and Regulations requires only that a complaint contain "a clear and concise description of the acts which are

[7] Those materials included written statements by Marquez and Flores. I find no reason to doubt the representation by counsel for the General Counsel that she had not known about the existence of these statements prior to their production at the hearing.

[8] The Amended Answer is admitted into evidence as a part of the formal papers, GC Exhibit 1(K).

claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." I find that the allegations in issue meet the requirements of the Board's rules and of due process. Moreover, the motion is moot. The Respondent has already seen the totality of the General Counsel's evidence on this issue. It consists entirely of the testimony of its company president which, presumably, it does not dispute.

The charge in this case was filed in February 2003. Kramer testified that, in March, he approached employee Eric Marquez at a jobsite, told him he had "an issue" with Lainez, and asked Marquez if he had any issues with Lainez. Kramer asked Marquez to provide him with a written statement. Within a day or so, he also approached employee Miguel Flores at a jobsite and asked him for the same kind of information. Two days later, each employee handed Kramer a written statement.[9] Kramer stated that he did not tell either employee that his involvement in the discussion about Lainez with him was voluntary or that, if he did not provide information or a written statement, no action would be taken against him. He also said that he did not tell Marquez and Flores that these conversations concerned an unfair labor practice charge against the company.

Analysis and Conclusions

The complaint alleges that Kramer's questioning of Marquez and Flores in connection with the preparation of the Respondent's defense in this matter was unlawful. In *Johnnie's Poultry*, 146 NLRB 770 (1964), the Board made it clear (p. 775) that an employer may lawfully question employees about matters involving their Section 7 rights in connection with "the investigation of facts concerning issues raised in a complaint where such interrogation is necessary in preparing [its] defense for trial of the case." However, the employer must assure that certain safeguards are met. It must communicate to the employee the purpose of the questioning, must advise him that no reprisals will take place, and obtain his participation on a voluntary basis. The questioning must be free of coercion, must occur in a context free of union animus, and must not exceed its legitimate purpose by inquiring into other union matters or the employee's subjective state of mind.

It is true that Kramer did not inform the employees why he was asking them about their issues with Lainez, that their participation was voluntary, or that there would be no reprisals. Those facts notwithstanding, I find that the limited evidence in this record fails to establish a *Johnnie's Poultry* violation. Nothing in the questions that Kramer posed indicated that they were related to these employees' Section 7 rights or those of other employees. He did not mention to them that a charge was pending before the Board or why he wanted their statements, other than to say that he had an "issue" with Lainez. There is no evidence that either of these employees had been interviewed as a part of the Board's investigation of that charge or that Kramer believed they had. His questions were limited to whether they had any "issues" with Lainez. There is no evidence that Kramer made any reference to the Union or inquired into any protected activity on their parts or that of any other employee. There is no credible evidence that either Marquez or Flores had previously complained to Kramer about Lainez or that their complaints entered into the decision to discharge Lainez. I find this was nothing more than an attempt on Kramer's part to dig up some support for the Respondent's strategy of portraying Lainez as a "bad guy" who deserved to be fired regardless of whether that played a part in its decision to do so. I find that there is no reasonable basis to conclude on this record that Kramer's questioning of Marquez or Flores was coercive or interfered with any rights protected

[9] Those statements are not in the record.

by the Act. I shall recommend that this allegation be dismissed.

B. Alleged Violation of Section 8(a)(3) and (1)

Miguel Lainez credibly testified that he was hired by the Respondent as a painter in June or July 2001. In July 2002, Lainez was assigned to a job in Lake Anna, Virginia, which he said was a 3-hour drive from his home. He informed Victor Machado that his car was not in good enough condition to make that drive and he stopped going to the Lake Anna job. About 10 days after in effect quitting his job, Lainez called Machado and asked to return to work. Machado told him he could come back and Lainez did so. In mid-December 2002, Lainez contacted the Union and spoke to representatives Lynn Taylor and Acevedos Gomez. Thereafter, Lainez and some co-workers met with the Union representatives 2 or 3 times at the home of one of the employees. At one of the meetings, Lainez signed a union representation card. Lainez spoke to other employees about the Union during their lunch periods. They discussed the assistance the Union might provide in obtaining a pay increase, overtime pay, and other benefits. As is discussed above, on January 14, Machado came to their jobsite and interrogated Lainez and Isaac Gonzales about their union activity and accused Lainez of organizing a union.

Lainez credibly testified that, on the following day, January 15, when Lainez and Gonzales who rode to and from the jobsite with him arrived at the jobsite, Kramer was present. After Lainez entered the house and began working, Kramer asked him to come outside with him. Lainez, who speaks some English, asked Kramer to call Machado to interpret for them. Machado was not at the jobsite, but Kramer called over an employee named Marcos to interpret. Kramer told Lainez that he had arrived 2 minutes late for work and that he was being run off. Kramer said that Machado had told him that Lainez had been arriving late. Lainez responded that he knew why he was being fired, that it was not because he arrived late and that Kramer would be hearing from his attorney. Kramer said that he did not know what Lainez was talking about, that he did not want Lainez around his employees or his jobsites, and that he should leave. Lainez went into the house to ask Gonzales if he could get a ride home and then left the jobsite. Gonzales credibly testified that, immediately after Lainez spoke with Kramer that morning, Lainez told him that Kramer had fired him because he arrived 2 minutes late. Later, Kramer himself told him and other employees that Lainez had been fired for arriving late and "this was a lesson for all the workers." The complaint alleges that Lainez was discharged because of his activity and support for the Union. The Respondent contends that Lainez was discharged not just because he was late for work that day but for a number of different reasons that accumulated during his tenure with it.

Analysis and Conclusions

In cases where an employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980) enf'd 662 F. 2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must persuade the Board that animus toward protected activity on the part of employees was a substantial or motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the employees' part. *Manno Electric*, 321 NLRB 278, 280 at fn. 12 (1996). The General Counsel's initial burden is met by proof of protected activity on the part of the employees, employer knowledge of that activity, and employer animus toward it. *W.R. Case & Sons Cutlery Co.*, 307 NLRB 1457, 1463 (1992).

There is uncontradicted evidence that Lainez and other employees engaged in protected

activity by contacting and meeting with representatives the Union, by signing union authorization cards, and by discussing what the Union could do for them at meetings in an employee's home and at jobsites.

The evidence also establishes that the Respondent knew that its employees were engaging in union activity and that Lainez was the organizer. In his testimony, which was elicited largely through leading questions by the Respondent's counsel, Kramer claimed that he did not know that his employees were trying to organize a union when he fired Lainez and said that he had never heard of "the Painters and Decorators Union." However, he admitted that during December 2002 he had heard from Machado that some of the employees were attending meetings and Kramer speculated that it could be "a union meeting," perhaps, "a painters or decorators union . . . meeting." On the day before he was fired, Lainez was confronted and questioned by Machado about his union activity and he had admitted his involvement with the Union. This clearly establishes the Respondent's knowledge and I do not credit Kramer's claim that he did not know about Lainez' union activity.

Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence and the inferences drawn there from. E.g., *Abbey Transportation Services*, 284 NLRB 698, 701 (1987); *Pete's Pic-Pac Supermarkets*, 707 F.2d 236, 240 (6th Cir. 1983); *Shattuck Denn Mining Corp.*, 362 F. 2d 466, 470 (9th Cir. 1966). The timing of an employer's action can be persuasive evidence of its motivation. *Masland Industries*, 311 NLRB 184, 197 (1993); *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981). As noted above, the Respondent suspected that its employees were engaging in union activity in mid-December 2002 and it got confirmation of Lainez' union involvement on January 14, 2003, when Machado interrogated him and told him he was "stupid" for trying to organize a union.. He was fired the next day. The Respondent's union animus is further established by the violations of Section 8(a)(1) of the Act found herein. *Farm Fresh, Inc.*, 301 NLRB 907 (1991).

Under *Wright Line*, the burden has shifted to the Respondent to establish that it would have terminated Lainez even in the absence of the union activity on his part. The only reason Kramer gave Lainez when he fired him on January 15 was that he was late that day. The testimony of Lainez and Gonzales establishes that they rode together to the jobsite after Lainez picked Gonzales up at a Metro station. On a number of prior occasions, Lainez had called Machado to report that he would be late because he was waiting for Gonzales at the station. Each time, Machado had told Lainez to wait for Gonzales. On January 15, they arrived at the jobsite together, yet, only Lainez was spoken to and disciplined by Kramer. Kramer called Lainez outside and told him he was fired for being late, without asking or giving him an opportunity to explain why he was late. The Board has long held that an employer's failure to investigate alleged misconduct or to give employees the opportunity to explain their actions is a significant factor in findings of discriminatory intent. E.g. *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988); *Syncro Corp.*, 234 NLRB 550, 551 (1978). It is particularly pertinent here since Kramer admittedly knew that Lainez had been late before because he had to wait for Gonzales at the Metro station. However, Kramer made no attempt ascertain who was at fault that morning even though Gonzales was working nearby. Kramer took no disciplinary action against Gonzales for being late on January 15.

At the hearing, Kramer testified that Lainez' being late on January 15 was not the only reason Lainez was fired but that his decision was based on a number of cumulative reasons. These reasons were Lainez' tardiness, his inability to work with others, the fact that a job superintendent had commented about Lainez, that other employees were complaining that they could not work with Lainez, and that work was getting slow. This shift in reasons for Lainez' discharge strengthens the inference that the true reason was his union activity. E.g., *United*

States Service Industries, 324 NLRB 834, 837 (1997); *Abbey's Transp. Services, Inc. v. NLRB*, 837 F. 2d 575, 581 (2d Cir. 1988).

There was evidence that throughout much of the time Lainez worked for the Respondent he was less than a model employee, at least in Kramer's view. Kramer testified that in July 2002, Lainez was assigned to work at a jobsite at Lake Anna, Virginia. He failed to appear at work for several days without calling in and was terminated. Two weeks later, Lainez was rehired by the Respondent and no written discipline was issued to him. In August 2002, Lainez showed up 30 minutes late at a jobsite where he was supposed to meet Kramer and a contractor. Kramer told him "we can't keep having this," but no disciplinary action was taken against him. In September 2002, Machado reported to him that Lainez was repeatedly arriving late at a jobsite in Potomac, Maryland. No disciplinary action was taken against Lainez. In October 2002, a job superintendent complained to Kramer about Lainez' attire on a job. Kramer spoke to Lainez about his attire but no disciplinary action was taken against him. In November 2002, Lainez submitted a time sheet indicating that he had worked at a jobsite in Great Falls, Virginia, until 6 p.m. when he had left at 4 p.m. The 2 hours was deducted from Lainez' pay but no disciplinary action was taken against him. On November 28, 2002, Lainez arrived 30 minutes late at the same jobsite. The 30 minutes was deducted from his pay but no disciplinary action was taken against him. Beginning in October 2002, Kramer heard that Lainez was not getting along with other employees, that they "have difficulty working with him," and that "he doesn't want to do . . . his part.". No disciplinary action was taken against Lainez because of any of this, nor is there any evidence that anyone from management ever spoke to Lainez about his alleged "confrontational" conduct or other employees' complaints about him. According to the Respondent, Lainez had numerous shortcomings as an employee, but it not only took no disciplinary action against him, at one point, after he had been terminated for his repeated failure to appear at a jobsite, it rehired him. However, once it got confirmation that he was talking to its employees about the Union, it acted quickly and decisively and fired him the next day, allegedly, for the same conduct it had largely condoned and/or ignored over the past several months.

Finally, according to Kramer, the reason that he decided on January 15 to no longer tolerate Lainez' alleged misconduct was that "work was slowing down." He testified that the slowdown began in late November or early December 2002 and that time sheets would indicate that employees were working reduced hours. He also claimed that some employees were laid off due to this slowdown. I do not credit this self-serving claim for several reasons. First, he was unable to identify the employees who were allegedly laid off. More important, the Respondent failed to produce the timesheets Kramer claimed would corroborate his testimony. This failure to produce important evidence peculiarly within its control raises the presumption that it would not support the Respondent's position. *Northern Railway Co. v. Page*, 274 U.S. 65, 74 (1927); *Master Security Services*, 270 NLRB 543, 552 (1984). I find that the Respondent has not met its burden under *Wright Line* of showing that it would have discharged Lainez on January 15 even in the absence of union activity on his part. On the contrary, the evidence establishes Lainez was discharged because he had engaged in activities and support for the Union and his discharge violated Section 8(a)(3) and (1) of the Act. E.g., *American Cyanamid Co.*, 301 NLRB 253, 254 (1991); *Ford Paint & Varnish Co.*, 264 NLRB 1189, 1195-1197 (1982); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980).

Conclusions of Law

1. Spectrum Contracting, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By coercively interrogating and threatening employees concerning their union activities and those of other employees and by giving employees the impression that their protected activities were under surveillance, the Respondent violated Section 8(a)(1) of the Act.

4. By discharging Miguel Lainez because he had engaged in protected activities in support of the Union, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Miguel Lainez, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[10]

The Respondent, Spectrum Contracting, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they have supported Painters & Allied Trades, District Council 51, AFL–CIO, or any other labor organization.

(b) Coercively interrogating or threatening employees concerning their union or other protected activities and those of other employees.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Giving employees the impression that their union or other protected activities are under surveillance.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Miguel Lainez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Miguel Lainez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Miguel Lainez in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Catharpin, Virginia, copies in English and Spanish of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Because it appears that the Respondent's employees do not regularly visit its Catharpin, Virginia facility, the Respondent shall duplicate and mail, at its own expense, copies of the notice in English and Spanish to all current employees and to the last known address of former employees employed by the Respondent at any time since February 2, 2003.

[11] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, DC October 10, 2003

_____
Richard A. Scully
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against our employees for supporting Painters & Allied Trades, District Council 51, AFL–CIO, or any other union.

WE WILL NOT coercively interrogate or threaten our employees concerning their union or other protected activities or those of other employees.

WE WILL NOT create the impression that our employees' union or other protected activities are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Miguel Lainez full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Miguel Lainez whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Miguel Lainez and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

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_____
(Employer)

10 Dated _____ By _____
(Representative) (Title)

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40 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

45 103 South Gay Street, The Appraisers Store Building, 8th Floor, Baltimore, MD 21202-4061

(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

50 THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-3113.